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Petition.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner prays for writs of certiorari to review a decision of the Circuit Court of Appeals for the Second Circuit, in admiralty, reversing and modifying two decrees of the District Court for the Eastern District of New York. In the first suit, the District Court awarded damages to the libelant, Henry DuBois Sons Company, as owner of Scow "D 22", against respondent's motor vessel "Segundo", and dismissed a petition under the 56th Rule in Admiralty against petitioner's steamtug "Ariosa". In the second suit, the District Court dismissed respondent's libel against petitioner's steamtug "Ariosa". The Circuit Court of Appeals, by its decision, held both the steamtug "Ariosa" and the M/V "Segundo" at fault and divided the damages.

The opinion of the Circuit Court of Appeals dated December 23, 1940, is reported in 116 F. (2d) 492 (R. 193) and that of the District Court in 33 F. Supp. 144 (R. 157). A petition for rehearing (R. 198) was denied without opinion (R. 215). The orders for mandate were entered in the office of the Clerk of the Circuit Court of Appeals for the Second Circuit on January 20, 1941 (R. 218). Jurisdiction is based on §240(a) of the Judicial Code, as amended; 28 U. S. Code §347.

Summary.

These cases involve a direct conflict between the decisions of two Circuit Courts of Appeals in interpreting Pilot Rule III of the Supervising Inspectors

in relation to a statute of the United States (33 U. S. Code §203).*

There was a collision in New York Harbor between respondent's motor vessel "Segundo" and a dump scow in tow of the petitioner's steamtug "Ariosa", for which both the "Ariosa" and "Segundo" have been held at fault. The steamtug "Ariosa", with three heavily loaded dump scows in tandem formation on a hawser, was proceeding down the North River on a course to the east of mid-channel; the M/V "Segundo" was proceeding up the North River on a course to the west of mid-channel. The initial courses of the vessels were safely starboard to starboard approximately a quarter mile apart. The material fact is that the "Ariosa" and the M/V "Segundo" were at all times "*green to green*", that is to say, on courses safely to starboard of each other (R. 82). When the "Ariosa" and "Segundo" were almost abreast of one another, the "Segundo" negligently turned to starboard and collided with the tow of the "Ariosa". Fault on the part of the M/V "Segundo" has been conceded throughout.

The relevant statute (33 U. S. Code §203) requires meeting vessels to sound passing signals only if they are approaching in a manner so as to involve "risk of collision". "Risk of collision" is defined in the statute as a situation where each vessel would, in the night time, see both the red and green side lights of the other. The statute specifically prohibits the sounding of passing signals if "risk of collision" does not exist, that is, inter alia, if the green light of one vessel is opposed to the green light of the other, as in the present case.

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* The pertinent provisions of the statute and the Supervising Inspectors' Rules are printed in the appendix.

The Circuit Court of Appeals for the Second Circuit has held in these cases that a passing signal was required by Rule III of the Supervising Inspectors' Rules, despite the statutory prohibition.

The Circuit Court of Appeals for the Third Circuit, in a parallel case, has held the contrary, stating that Rule III of the Supervising Inspectors' Rules must be construed so as to be consistent with the statute.

The Gwynedd, 91 F. (2d) 112.

The conflict in the interpretation of Rule III of the Supervising Inspectors in relation to the statute (33 U. S. Code §203) by two adjoining Circuit Courts of Appeals, if allowed to continue, will result in many collisions with attendant loss of life and damage to property.

Questions Presented.

1. Must not the interpretation of the statutory rules of navigation and of the Supervising Inspectors' rules be uniform throughout the United States?

2. Can the Supervising Inspectors promulgate rules which are inconsistent with the statutory rules of navigation?

Statement.

On December 7, 1938, the steamtug "Ariosa", with a hawser tow of three loaded dump scows, was proceeding down the North River in New York Harbor, and the M/V "Segundo" was proceeding up the North River. The courses of the vessels were such that they would have passed to starboard of one another at a

distance of approximately a quarter of a mile. Without sounding any signal to indicate her intention, the "Segundo" negligently turned to starboard. The master of the "Ariosa" sounded an alarm signal, but the "Segundo" continued her sheer to starboard. The alarm signal was repeated by the "Ariosa". The port anchor of the "Segundo" was then dropped and her engines reversed, but the headway of the "Segundo" could not be checked until she had crossed the towing hawser of the "Ariosa" and come into collision with the first scow.

It was conceded in the pleadings, at the trial and on the argument of the appeal that the "Segundo" was at fault (R. 9, 29, 194). It was contended on behalf of the M/V "Segundo" that the "Ariosa" was likewise at fault for failing to sound passing signals (R. 12).

With respect to this contention the District Court had held that the courses of the two vessels were so far to starboard that the provisions of Article 18, Rule I of the statute (33 U. S. Code 203) prohibited the sounding of a two-blast passing signal (R. 166). The Circuit Court of Appeals, however, has held that although the statute did not require the sounding of a passing signal, Rule III of the Supervising Inspectors' Rules made such a signal obligatory. The Circuit Court said:

> "But, in addition to this statutory rule, we have Pilot Rule III of the Supervising Inspectors * * *, which provides that the passing signals shall be given 'not only when meeting "head and head", or nearly so, but at all times when the steam vessels are in sight of each other, when passing or meeting at a distance within half a mile of each

other, and whether passing to the starboard or port'" (R. 195).

The Circuit Court of Appeals then said:

"It is obvious, therefore, that, if the 'Segundo' was to pass the 'Ariosa' starboard to starboard, the passing would be at a distance of not more than a quarter mile, and well within the rule" (R. 196).

The Circuit Court of Appeals for the Second Circuit therefore has held, that a rule of the Supervising Inspectors may be so interpreted by the Court that it repeals or modifies the Inland Rules of Navigation which were enacted by Congress for the stated purpose of preventing collisions. Such an interpretation of a rule of an administrative body should not be permitted to stand, particularly when that rule is capable of being interpreted in a manner entirely consistent with the statute. Obviously, the Supervising Inspectors rules should not be so interpreted as to require the sounding of a signal which the statute prohibits.

This decision is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit. In *The Gwynedd,* 91 F. (2d) 112, the Circuit Court of Appeals had for consideration a parallel situation. With respect to the contention that Rule III of the Supervising Inspectors' Rules requires passing signals to be sounded when there is no "risk of collision", the Court said:

"Rule III, literally construed, would require the signal to be given at one-half a mile whether or not the vessels were in a position of danger

> with respect to one another or not. Rule IV expressly requires a condition of 'risk of collision'. We do not believe, however, that rule III should be so construed as to be inconsistent with rule IV. We think that rule III applies and is intended to apply only where vessels are in a position of danger in respect to one another, and we so hold."

Pilot Rule IV referred to in this decision is the statutory provision (33 U. S. Code 203) whereas Pilot Rule III is a rule of the Supervising Inspectors.

The decision by the Circuit Court of Appeals for the Second Circuit in the present case requires signals irrespective of the existence of the conditions required by the statute. This holding is a departure from earlier decisions in the Second Circuit. In *The John King,* 49 Fed. 469, an analogous situation was presented. There the Circuit Court of Appeals for the Second Circuit said:

> "As we understand the rules of the supervising inspectors, they mean to require steamers at all times, when passing or meeting at a distance within a half mile of one another, to give and answer signals by blasts of the steam-whistle to indicate what course they propose to take; * * *. The rules of navigation enacted by congress are obligatory upon vessels approaching each other from the time necessity for caution begins; and from that time, as the vessels advance, so long as the means and opportunity to avoid danger of collision remain. Until the necessity for precaution begins, obviously, there can be no fault on the part of either vessel,—rules of the inspectors to the contrary notwithstanding,—of which the other can justly complain."

The conflict between the statute and the interpretation placed on Rule III of the Supervising Inspectors' Rules by the Circuit Court of Appeals for the Second Circuit distorts the uniformity of the rules for navigation, which are designed to prevent collision. Uncertainty regarding the rules for navigation is a disturbing condition, which should not be permitted to exist. The decision of the United States Circuit Court of Appeals for the Third Circuit in *The Gwynedd* is entirely consistent with the statutory provisions of 33 U. S. Code, Section 209 (the Inland Rules). The decision of the Circuit Court of Appeals for the Second Circuit in the instant case is inconsistent with the statutory provisions and, if adopted, will lead to hopeless confusion in navigation in inland waters. This is fully discussed in the petition for rehearing, Point II (R. 200) and Point III (R. 206).

The conflict between the decisions of the Circuit Court of Appeals for the Second and Third Circuits is so clear and the seriousness of this conflict is so apparent that it requires no extended discussion. It should be sufficient to state that the master of the "Ariosa" had complied in every respect with the provisions of the statute; that if this suit had been brought in any district court in the Third Circuit, the "Ariosa" would have been exonerated, but that since the suit was brought in the Second Circuit, the "Ariosa" has been held at fault and her owner called upon to pay substantial damages. We believe that the time has come for the clarification of this serious and confusing situation.

Licensed officers of steam vessels are subject to disciplinary action for violation of the rules promulgated for navigation (33 U. S. Code 158; 46 U. S. Code 239). In the present case the master of the "Ariosa" had

complied with the provisions of the statute and yet the Circuit Court of Appeals has found that he violated one of the rules of the Supervising Inspectors. If this be true, the master of the "Ariosa" has become subject to disciplinary action.

On the other hand, if this case had been litigated in the Third Circuit, the master of the "Ariosa" would have been acquitted of any violation of Rule III of the Supervising Inspectors and the claimant of the "Ariosa" would have been exonerated in this action.

Such a conflict in the interpretation of the Supervising Inspectors' Rules is shocking, particularly when the rule can be so interpreted as not to be in conflict with the statute. Rule III is not invalid; it is consistent with the statute if it is read in reference to the statute.

The relation between Rule III and the statute has never been determined by this Court. It is respectfully submitted that the conflict between the Circuits should be considered by this Court.

Reasons for Allowance of Writs.

1. There is a conflict between the decision of the Circuit Court of Appeals for the Second Circuit in the present case, and the decision of the Circuit Court of Appeals for the Third Circuit in *The Gwynedd*, 91 F. (2d) 112.

2. The licensed officers of steam vessels are subject to the disciplinary action of the Supervising Inspectors for a violation of their rules (33 U. S. Code 158; 46 U. S. Code 239), and so long as the present conflict exists an officer must choose in cases of this kind whether to obey the Inspectors' Rules or to obey

the statute. In either event he risks his license. Uncertainty as to the laws of navigation is not conducive to safety.

3. The case presents an important question of maritime law which has not been decided by this Honorable Court and which should be decided in order to maintain the uniformity of the maritime law of the United States.

Conclusion.

It is respectfully submitted that this controversy, immediately presenting an important question of maritime law that has not been decided by this Court and on which two Circuit Courts of Appeals now differ, is of such general concern as to merit review by this Honorable Court.

Henry Du Bois Sons Company,

By Charles W. Hagen,
Proctor for Petitioner.

Dated, New York, N. Y., March 17, 1941.